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# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 367

RUSSELL LOUIS LAROSE, PETITIONER

*v.*

LIEUTENANT GENERAL W. G. WYMAN, OR ANY OTHER COMMANDING OFFICER OF THE SIXTH ARMY, PRESIDIO, SAN FRANCISCO, CALIFORNIA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals (Pet. App. iii–xii; R. 95–102) is reported at 223 F. 2d 849.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1955 (Pet. App. xiii–xiv; R. 103) and a petition for rehearing was denied on July 25, 1955 (Pet. App. xv; R. 105). The petition for a writ of certiorari was filed on September 1, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTION PRESENTED

Whether petitioner was deprived of administrative procedural rights under the Universal Military Training and Service Act.

### REGULATIONS INVOLVED

The pertinent Selective Service Regulations (32 C. F. R. (1951 ed.)) are set forth in the Appendix *infra*, pp. 15–18.

### STATEMENT

In April 21, 1954, in the United States District Court for the Northern District of California, petitioner filed a petition for a writ of habeas corpus challenging the validity of his detention by the United States Army for trial by court-martial for desertion. He alleged that on January 22, 1952, he was unlawfully and without basis in fact classified I–A–O (eligible for noncombatant military service only) under the Universal Military Training and Service Act; that on February 1, 1952, within the time provided by law, he filed a notice of appeal from said classification, that no appeal was granted, and hence that the classification and the induction order under which he was inducted were void (R. 3–8).

At the hearing on the petition, petitioner's selective service file was introduced in evidence as Government Exhibit 1 (R. 17). Pertinent facts from such exhibit are as follows:

In his classification questionnaire filed on November 13, 1951, with Local Board No. 48 in

Milwaukee County, Wisconsin, petitioner stated that he was born on October 27, 1932; that he was a full-time student preparing for aeronautical engineering at Deep Springs Jr. College, Deep Springs, California; and that he was conscientiously opposed to participation in war in any form (F. 2–9).[1]

In November 1951, petitioner executed SSS Form No. 150 for conscientious objectors in which he stated that he believed "in a Divine Being" and that "force may be used only to prevent something beyond force, namely homicide, and then only if prevents it without homicide on its own part"; that he and his parents were members of the Lutheran faith which requires participation in the defense of one's country when called upon to do so; and that his conscientious opposition to war was a matter of his own interpretation of the Christian doctrine and his own personal philosophy. Petitioner did not indicate, as required by the questions in Series I of the form, whether he was opposed merely to combatant service or to both combatant and noncombatant service (F. 10–13).

On January 22, 1952, petitioner was classified I–A–O. Notification of such classification on Form 110 was mailed to him and he was ordered to report for the armed forces physical examination (F. 9).

[1] The designation "F" refers to Exhibit 1.

On January 26, 1952, petitioner wrote to the Milwaukee board stating that he believed that his order to report for a physical examination was in error since to his knowledge he had not even been classified; that if he had been classified as eligible for induction that classification was in error since he was conscientiously opposed to war; and that he was a student at Deep Springs College. He added that he would "like to know how I, as a student, stand with your board, disregarding my conscientious objections" (F. 62–63). On the same date, the Director of the College notified the board that petitioner was a full-time student in good standing (F. 61).

On February 1, 1952, petitioner wrote the board saying "I request an appeal of my classification". He stated that he had received notice of his I–A–O classification; that he was not satisfied with it; that his conscientious objection stemmed from the Fifth Commandment and from the teachings of the founders of this country of the "inalienable right to life" by all; and that he was opposed to noncombatant as well as combatant military service. He ended by saying: "Please, carefully reconsider your classification. I can ask of you nothing more" (F. 66–67).

On April 22, 1952, petitioner's classification was reopened and he was reclassified II–S (student deferment) until June, 1953 (F. 9, 46–54). Pe-

titioner was notified of this classification on Form 110 on July 23, 1952 (F. 9).

On September 13, 1952, the Director of Deep Springs College advised the draft board that petitioner was no longer enrolled at the college for the current academic year (F. 45). On September 23, 1952, the draft board on its own motion reopened petitioner's classification, reclassified him I–A–O and notified him accordingly on Form 110 (F. 9). On October 3, the Deputy State Director for Selective Service requested petitioner's file for "an opportunity to review his case" (F. 44). The file was sent to him on October 6 and he returned it on October 10 (F. 42–43). The file does not show the reason for this request.

On October 20, 1952, petitioner was ordered to report for a physical examination on November 12, 1952 (F. 41), and was found acceptable (F. 9). In December 1952, in reply to the board's letter for information, petitioner replied that he was not employed or attending school on a full-time basis, but that he was "engrossed in a full time independent education on my own" and planned to continue this self-education (F. 28–30). On January 12, 1953, petitioner was ordered to report for induction on February 13, 1953 (F. 27). He was inducted into the Army on that date (F. 25).

On April 3, 1953, petitioner left camp without leave. He was apprehended and returned to the

camp on April 14, 1953, and on April 23, 1953, left again without leave. He was apprehended in January 1954 and placed in the custody of the Army awaiting court-martial on desertion charges (R. 4, 6; F. 22).

At the habeas corpus hearing, petitioner testified that, after he received the second I–A–O classification on September 23, 1952, he went to the board within one day and told the clerk in charge that he was dissatisfied with his classification and wished action taken on it; that the clerk replied that "it wouldn't do you any good"; that he returned every day for a few days thereafter with the same complaint; that he was not allowed to talk to the board members, but was finally told to talk to the Deputy State Director; that within a week following his reclassification on September 23, petitioner saw the Deputy State Director and told him that he wished his case to be "reconsidered"; that the Deputy State Director told petitioner that "an appeal would be useless, they had just voted on it and had reached a conclusion I [petitioner] was I–A–O, and nothing more, and there was nothing I [petitioner] could do about it but be drafted"; and that, relying on these statements from the Deputy State Director and from the clerk, petitioner took no appeal (R. 60–63). He also testified that after his induction into the armed forces, he was placed in an artillery unit and given a weapon;

that when he refused to have anything to do with that type of training, he was placed on latrine duty temporarily while they checked his records; and that he was then transferred to Camp Pickett, Virginia. While at camp he talked with several chaplains about his position. He testified that he finally deserted because of his conscientious scruples (R. 47–48).

The District Court on June 18, 1954, granted the petition for a writ of habeas corpus (R. 10). By orders dated June 23 and June 24, it ordered petitioner released from custody (R. 11–12). On appeal, the Court of Appeals reversed the order of the District Court, holding that petitioner had failed to exhaust his administrative remedies under the Selective Service System.

## ARGUMENT

1. Petitioner attacks (Pet. 11–13) the validity of the induction order dated January 12, 1953, under which he was inducted into the armed forces. Specifically, he challenges the validity of the I–A–O classifications which he received on January 22, 1952, and on September 23, 1952, on the ground that he was deprived of his administrative right of appeal from these classifications under the Universal Military Training and Service Act.

Petitioner's challenge (Pet. 11–12) of his I–A–O classification by the local board on January 22, 1952, is irrelevant to this action. As the

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Court of Appeals pointed out (Pet. App. xii; R. 100-101), the induction order which he is attacking in his petition for a writ of habeas corpus did not result from that classification. His request in his letters of January 26 and February 1, 1952, which were more like requests for a reconsideration of that classification than for appeal, did result in reconsideration and in a lower classification (II-S) which deferred him from military service. He did not appeal from this lower classification.

Although the District Court held petitioner's letter of February 1, 1952, "constituted an appeal" which deprived the local board of further jurisdiction over his case (R. 9), the Court of Appeals correctly held to the contrary that this letter was a request for reconsideration by the local board (R. 101). While the letter began with the statement "I request an appeal of my classification", it ended with "Please carefully reconsider your classification" (Statement, *supra*, p. 4). At the very least, the local board was entitled to treat the letter as a request for *its* reconsideration. Cf. *United States* v. *Vincelli*, 215 F. 2d 210 (C. A. 2). This is emphasized by the fact that only a few days before the local board had received from petitioner and the director of his college information indicating that he desired and was eligible for a student deferment (Class II-S). Since Sections 1623.2 and 1626.25 (a) (2) require both

local and appeal board to classify a registrant in the lowest class for which he is eligible. (App., *infra*, pp. 15, 17–18), and since class II–S is lower than the conscientious objector classifications, the local board properly placed petitioner in Class II–S as a student.

Thus, the issue here is whether the circumstances surrounding the second I–A–O classification in September 23, 1952, which resulted in his induction into the armed forces, amounted to a deprivation of his administrative right to appeal.[2] Petitioner argues (Pet. 12–13) that the uncontroverted evidence shows that he was deprived of his right by the local board and the Deputy State Director in September and October, 1952. Petitioner's own version of the events (R. 61–63) does not support that conclusion. From his own testimony, it is clear that the State Director did not advise him that he could not appeal. The most that the evidence indicates is that petitioner was told both by the clerk and the Deputy Director that he would not be successful in his appeal. Even if petitioner's testimony be taken at full face value, it seems clear that those statements were undoubtedly made in response to petitioner's request for an opinion as to the probable outcome of an appeal, preliminary to his determining whether to appeal.

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[2] The District Court made no findings with respect to this second I–A–O classification.

There is no evidence that petitioner was unaware of his right to appeal. He did not need advice on that score. He was a college student; his letters to the draft board which appear in the selective service file show that he was an educated, intelligent person who was quite familiar with his rights under the Universal Military Training and Service Act; his own testimony reveals his awareness of that right; and the special form for conscientious objectors, SSS Form No. 150, which was sent to petitioner and which he executed and returned to the board, specifically states that the regulations provide for an appeal. More particularly, petitioner received three Form 110 notices of his classification, while his case was before the local board (see F. 9). Each such notice specifically informed him of his right to appeal within ten days. In addition, the fact that petitioner submitted to induction and remained in the Army for several months before he deserted tends to support the conclusion that his decision not to appeal was a deliberate one, which he reconsidered only after being charged with desertion. Accordingly, petitioner has made no showing that he was deprived of his administrative rights.[3]

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[3] Petitioner suggests (Pet. 13) that his efforts should have at least entitled him to a personal appearance before the local board. SSS Regulations, section 1624.1, provides that all such requests shall be in writing—which petitioner certainly did not do. By no stretch of the imagination,

Since petitioner did not appeal, he was not entitled to a hearing before the Department of Justice, in accordance with the provisions of SSS Regulations, section 1626.25. And having failed to exhaust his administrative remedy by appeal, he has no standing to contest the validity of his classification (see Pet. 14). *Falbo* v. *United States,* 320 U. S. 549; *United States* v. *Balogh,* 157 F. 2d 939 (C. A. 2), vacated on the authority of the *Falbo* decision, 329 U. S. 692; *United States* v. *Kalpakoff,* 217 F. 2d 748 (C. A. 9), certiorari denied, 348 U. S. 982; *Skinner* v. *United States,* 215 F. 2d 767 (C. A. 9), certiorari denied, 348 U. S. 981. See also the Government's brief in opposition in *Palmer* v. *United States,* No. 328, this Term, now pending on petition for a writ of certiorari.

2. It is also highly doubtful whether petitioner can in this action, while being held for court-martial for desertion after a substantial period of service, attack the validity of the selective service process under which he was inducted into the army.

This Court in *Gibson* v. *United States,* 329 U. S. 338, permitted Gibson to attack an allegedly invalid classification in a prosecution under the Selective Training and Service Act of 1940 for

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can his claimed conversations with the clerk at the local board be deemed to be oral requests for personal appearances.

unlawfully deserting a conscientious objector's camp. In *Billings* v. *Truesdell*, 321 U. S. 542, it permitted Billings in a habeas corpus remedy to challenge his detention by the Army pending court-martial proceedings for refusal to obey an Army order. But these cases are clearly distinguishable from the instant case. In *Billings*, this Court found that Billings had never been inducted into the Army and thus had no occasion to consider the nature of the duties which would have been his if he had submitted to induction. Gibson's case was processed by the Selective Service System prior to this Court's clarification in *Estep* v. *United States*, 327 U. S. 114, decided during the pendency of the *Gibson* case before this Court, of a registrant's right of judicial review of his classification. Hence his right to challenge his classification prior to induction was not clear. In addition, since Gibson was taken into a conscientious objector's camp rather than inducted into the Army, he was not subject to military jurisdiction, unlike the petitioner here. Uncertainty as to how Gibson could attack his classification even at that point, because he was still a civilian, and the fact that the decision would not result in undue interference with the administration of the armed forces, led to this Court's decision in favor of Gibson. None of those conditions is present here. Petitioner is under the jurisdiction of the military and he had

an opportunity to challenge his classification prior to his induction or immediately thereafter.[4]

Moreover, Gibson stayed in the camp for only five days before he departed without leave. In that connection, this Court said (*Gibson* v. *United States, supra,* at pp. 361–362), that it did not express any opinion "whether a different result might follow for one in Gibson's position if he should remain at the camp for a substantially longer period and then depart without leave." This is precisely what happened here. Petitioner was in the Army from February 13, 1953, until April 1953, before he deserted for the first time.[5] Petitioner's failure to take prompt action to seek his release from military service should preclude

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[4] It has been held that a registrant who was inducted into the armed forces under the 1917 Act could not desert and thereafter seek to escape the consequences of his desertion, as petitioner is seeking to do here, by contending that he was in fact exempt from military service and should not have been inducted. *Ex parte Kerekes*, 274 Fed. 870 (E. D. Mich.); *Ex parte Tinkoff*, 254 Fed. 912 (D. Mass.); *Ex parte Romano*, 251 Fed. 762, 764 (D. Mass.); *contra*, under the 1940 Act, in what we believe to be a misunderstanding of the *Gibson* case, *Cox* v. *Wedemeyer*, 192 F. 2d 920 (C. A. 9).

[5] Petitioner argues that the government, by appealing from the District Court's order of June 18, 1954, rather than from the orders of June 23 and June 24 did not appeal from the final order, and hence that the Court of Appeals did not have jurisdiction. The case had however reached finality on June 18. The June 23 and 24 orders merely implemented the June 18 order which decided the merits of this case (see Statement, *supra*, p. 7). The appeal was timely even if the notice should have referred more correctly to the later orders.

the granting of judicial relief. *Ex parte Blazekovic,* 248 E. D. 327 (Fed. Mich.) (2 months); *Mayborn* v. *Heflebower,* 145 F. 2d 864 (C. A. 5) (2½ months); *Sanford* v. *Callan,* 148 F. 2d 376 C. A. (5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1955.

# APPENDIX

## SELECTIVE SERVICE REGULATIONS

§ 1623.2 *Consideration of classes.* Every registrant shall be placed in Class I–A under the provisions of § 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I–A–O considered the highest class and Class I–C considered the lowest class according to the following table:

Class:

| | |
|---|---|
| I–A–O | IV–A |
| I–O | IV–B |
| I–S | IV–C |
| II–A | IV–D |
| II–C | IV–F |
| II–S | V–A |
| I–D | I–W |
| III–A | I–C |

* * * * *

§ 1624.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classifica-

tion (SSS Form No. 110) to him. Such 10-day period may not be extended.

* * * * *

§ 1625.1 *Classification not permanent.* (a) No classification is permanent.

* * * * *

§ 1625.2 *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant * * * (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

* * * * *

§ 1625.13 *Right of appeal following reopening of classification.* Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

* * * * *

§ 1626.2 *Appeal by registrant and others.* (a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of

the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition.

* * * * *

(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110).

* * * * *

§ 1626.11 *How appeal to appeal board is taken.* (a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

* * * * *

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

* * * * *

(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I–A–O or in Class I–A–O,

the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

* * * * *

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. * * *

* * * * *

§ 1626.41 *Appeal postpones induction.* A registrant shall not be inducted either during the period afforded him to take an appeal to the appeal board or during the time such an appeal is pending.

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